***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF & APPENDIX

76-1226

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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In the Matter of the
Grand Jury Subpoena of

LUREIDA M. TORRES.

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# BREIF and appendix FOR APPELLANT

UNITED STATES COURT OF APPEALS
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APPELLANT'S BRIEF

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# BRIEF FOR APPELLANT

## Preliminary Statement

This is an appeal from an order of Judge Charles L. Brieant, Jr., rendered on May 13, 1976 adjudging a grand jury witness in civil contempt following her refusal to answer certain questions under a grant of use immunity. The opinion of the District Court for the Southern District of New York is not reported and is attached to this brief as an appendix. It consists of pages 13-40 of the Transcript of Proceedings of May 13, 1976.

## Statement of the Case

Between October 26, 1974 and October 25, 1975, a series of fifteen dynamite explosions occurred in New York City. Responsibility for the bombings was claimed by an organization calling itself the Armed Forces of (Puerto Rican) National Liberation - FALN. (Affidavit of Nesland, April 27, 1976, Motion to Contempt.)

Investigators from the FBI, the New York City Police Department, the Puerto Rico Police Department, the Puerto Rico Department of Judtice, the Senate Internal Security Subcommittee and the

Directorate of International Security Affairs of the Defense Department became involved in the effort to establish the identity of those responsible for the blasts. (Criminal complaints, Exhibits B, C, D and E, Newspaper stories, Exhibit F-1 and F-2, Motion to Quash, Newspaper stories, Exhibits E and F, Affidavit of Stolar in Opposition to Motion for Contempt).[1]

On January 8, 1976, Lureida M. Torres, an unemployed schoolteacher and member of the Puerto Rican Socialist Party, a leading exponent of independence for Puerto Rico, was subpoenaed to appear before a federal grand jury in the Southern District of New York. (Affidavit of Torres, Motion to Quash, February 3, 1976). She had been visited by the FBI two days before and, in spite of the agents' pounding on her door for more than an hour, had refused to speak with them. She was told by the agents: "If you don't talk to us, you will have to appear before a grand jury." The agents who served the subpoena two days later told her: "Listen, you could have saved all this trouble by talking to us." (Affidavit of Torres, 2/3/76). The subpoena cited 18 U.S.C. Section 1073 (Interstate Flight to Avoid Prosecution). Counsel for Ms. Torres were advised by the Assistant U.S. Attorney that he was looking for former fugitive Juan Antonio Castillo-Ayala's "other friends" and that Ms. Torres might know where they were or give him leads to other persons or addresses that

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[1]A reasonable inference that the Central Intelligence Agency was also involved can be drawn from the allegations of the Criminal Complaints that wanted fugitives had travelled to Cuba, the Dominican Republic, France and Spain.

would "because these people normally keep in close contact." (Affidavit of Torres, 2/3/76). The subpoena cited 18 U.S.C. Section 1073 (Interstate Flight to Avoid Presecution). Her name, it was alleged, had been found in an address book among Castillo-Ayala's possessions. (Affidavit of Torres, 2/3/76).[2]

On February 4, 1976, by order to show cause, Ms. Torres moved to quash the subpoena, alleging that the grand jury in New York had no jurisdiction to hear evidence on the violation of 18 U.S.C. 1073 and that the subpoena was an unlawful attempt to compel testimony solely as an adjunct to the FBI.

At a hearing held on February 9, 1976, before Judge Constance B. Motley, the Assistant U.S. Attorney, on consent, amended the subpoena to include a citation to 18 U.S.C. Section 1071 (harboring of fugitives). He indicated that the grand jury was now interested in asking Ms. Torres about her knowledge, if any, of who harbored any of the fugitives in New York (Transcript of Proceedings, February 9, 1976, hereinafter Tr. 2/9/76).

Further hearing on the motion to quash was scheduled for March 3, 1976 to resolve the factual dispute over whether the grand jury wanted Ms. Torres' testimony in regard to the location of fugitives (an alleged lawful purpose). Prior the hearing, the government submitted an ex parte in camera affidavit purporting

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[2] Mr. Castillo-Ayala had been arrested in Manhattan in November, 1975 and returned to Puerto Rico where the Commonwealth charges lodged in 1970-71 were dismissed in January, 1976. (Exhibit G, Motion to Quash). Mr. Castillo is apparently not a target of the federal grand jury in New York. (Affidavit of Stolar, 5/5/76). His three co-defendants remain unapprehended.

to explain the purpose for which Ms. Torres' testimony was sought. Based upon this affidavit, the motion to quash was denied. (Tr.3/3/76).

When she subsequently appeared, Ms. Torres was questioned about whether she knew eight people (by name) including the four fugitives and two other witnesses who had been subpoenaed.[3] (Grand Jury Transcript of 3/3/76, Exhibit B to Nesland Affidavit of 4/27/76).

Ms. Torres declined to answer the questions on numerous grounds, including the Fifth Amendment. In addition, she made a statement to the grand jury:

> "Ladies and gentlemen, I have tried to figure out why I'm here today. I have tried to figure out why the FBI agents have been harrassing me and bothering me and knocking on my door.
>
> "It's very hard to understand all this action on their part. The only thing I could come up with is maybe I'm here because I am just Puerto Rican; this also means being prejudiced against, or also because I believe in the independence of my country, which is a lawful right that any person can have. Therefore, I don't see any reason why I should be here. I don't know what their after. I don't know what they want. I have never relly bothered anybody. Let me see what else.
>
> "So mainly I'm here in legal terminology and legal

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[3] These include the same questions that the FBI would have asked Ms. Torres had she agreed to speak with them on January 6, 1976 and, which answers, would have been turned over to the FBI to assist them in locating the fugitives. (Affidavit of Stolar 5/5/76).

just because I refuse to open the door to some FBI agent who came knocking on my door for almost an hour, and just because I refuse to open and talk to him, which is another right I have. They gave me a subpoena to appear to the Grand Jury. I have no idea what they want, and I don't know what they want from me either. Thank you.

"And I guess you know you have the right to excuse the subpoena. In other words, you have the right to quash the subpoena or forget about the subpoena, and let me go on with my daily life. That's all."

Following her refusal, the Assistant U. S. Attorney indicated to Ms. Torres' counsel that he would seek an order of immunity and she was asked to reappear on April 21, 1976. (Affidavit of Stolar, 5/5/[illegible]). When she returned, she was instead served with a new subpoena (citing numerous other federal criminal statutes) requiring her immediate appearance.

This time she was asked to "identify to the grand jury" any persons she knew who were involved in the fifteen bombings for which the FALN had taken credit as well as any persons she knew who were "members of or associated with" the FALN. (Grand Jury Transcript of 4/21/76, Exhibit E to Nesland Affidavit, 4/27/76). She again declined to answer citing, inter alia, the Fifth Amendment.

It was alleged below (and undenied) that neither the FBI nor the Assistant U.S. Attorney acquired any information concerning Ms. Torres knowledge of these events between the grand jury appearance of March 3 and that of April 21. The sole link between the witness

and the FALN was Ms. Torres' association with the independence movement and her membership in PSP. (Affidavit of Stolar, 5/5/76).[4]

The government's theory of investigation appears to be that because the FALN advocates independence for Puerto Rico, and because the witness also advocates independence, then she must know something about the bombings. In effect, the entire independence movement and all of its individuals and organizations are targeted for questioning because of professed beliefs and not due to any conduct or knowledge. (Affidavit of Stolar, 5/5/76). The interplay between the FBI and the grand jury regarding the FALN has come down to attempt to compile as complete a list as possible of people and organizations who now or in the past have advocated independence for Puerto Rico. From this list, it is hoped that the identities of the persons who set the bombs will be learned. (Affidavit of Stolar, 5/5/76).

The attempt to compile such a list has resulted in numerous visits by FBI agents to persons formerly or presently active in the independence movement. The persons visited are asked to give the structure and membership of political organizations they formerly or presently belong to and are asked to identify photographs culled from intelligence files maintained by the FBI and other law enforcement agencies. They are also questioned about their personal political beliefs concerning the independence of Puerto Rico.

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[4] The reason for the new subpoena and the change in the nature of the questioning was the government's desire to avoid the potential legal consequences of using the grand jury to locate fugitives. (Affidavit of Stolar, 5/5/76).

A principal method used by the FBI agents is to consciously and deliberately threaten a grand jury subpoena to those persons who refuse to speak with them. (Affidavit of Stolar, 5/5/76).

While pursuing the FALN investigation by working backwards from political beliefs, the FBI is engaged in gathering intelligence on the nature, scope, membership and plans of the entire independence movement with particular focus on the PSP.[5] Thus, people have been recently questioned by the FBI about (1) whether the FALN or the PSP were "behind" recent student demonstrations regarding City University budget cuts at Hostos College in the Bronx, and (2) plans for a Bicentennial demonstration in Philadelphia scheduled for July 4, 1976 organized by a number of political organizations including PSP.[5]

When Ms. Torres refused to answer questions on April 21, 1976, an application for use immunity pursuant to 18 U.S.C. Section 6002 was made to Judge Brieant. Although counsel for the witness was present, the District Court treated the application as ex parte. (Tr. 4/21/76). During this proceeding a motion for disclosure of electronic or other surveillance on the witness and her counsel was filed. The Assistant U.S. Attorney submitted an affidavit one hour later indicating that to his knowledge and to the knowledge of his

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[5]The intelligence gathering efforts have included surveillance and identification of those persons attending the Court proceedings in this case in the District Court: A special sign-in list was maintained (Tr. 4/21/76 pp. 2, 28-29, 38-40), pictures of those in attendance have been shown by FBI agents to other people in an attempt to establish their identities (Affidavit of Stolar 5/5/75), and an attempt to clandestinely photograph the spectators at the District Court proceedings of May 6 was discovered. The license plate of the van from which the photos were taken turned out to be registered to a brick wall (Affidavits of Siegel and Wunsch, 5/6/76, 5/11/76 and 5/12/76).

superiors there was no electronic surveillance of Ms. Torres. The affidavit also indicated that the FBI agent in charge of the investigation was "not aware of any electronic surveillance conducted with respect to Lureida M. Torres." (Affidavit of Nesland, 4/21/76). The immunity order was then signed and included a direction to the witness to answer "as to all matters about which she may be interrogated."

Ms. Torres then returned to the grand jury where she persisted in her refusal to answer questions. (Grand Jury Transcript, 4/21/76, Exhibit F, Affidavit of Nesland 4/27/76). She cited the protections of the First, Fourth, Sixth, Ninth and Thirteenth Amendments, Articles I and III of the Constitution and various statutory and common law rights as her basis for refusing. In addition, she stated: " . . . I believe the grand jury is being used as a means of repression, pressure against political activists or anyone who believes in the independence of Puerto Rico."

A motion to have Ms. Torres held in contempt was then filed by the government and opposed on papers by the witness' counsel. Argument was heard on May 6 and 13, but no evidence other than affidavits, exhibits and offers of proof was taken.[6]

Ms. Torres was ajudicated a recalcitrant witness pursuant to 18 U.S.C. Section 1826 and ordered incarcerated for the life

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[6]A request to conduct an evidentiary hearing on the motion for contempt was denied. The allegations of the witness' counsel concerning the nature and purpose of the investigation were accepted by the District Court and ruled to be "legally insufficient." (Tr. 5/13/76, pp. 13, 45-46).

of the grand jury (October 28, 1976) or until she answered the five questions which the District Court ruled she had no "just cause" to refuse to answer. She was released in her own custody pending the determination of this appeal.

## POINT I

### JUST CAUSE IS PROVIDED FOR REFUSING TO TESTIFY BEFORE A FEDERAL GRAND JURY WHEN THERE HAS BEEN NO SHOWING SUFFICIENT TO OVERCOME THE WITNESS' FIRST AMENDMENT RIGHTS; THE DISTRICT COURT ERRED IN NOT COMPELLING SUCH A SHOWING.

#### A. The Political Views and Associations of a Witness Form an Insufficient Basis Upon Which to Issue a Subpoena.

The purpose of a grand jury subpoena is to acquire information needed by the grand jury for its proceedings. It follows, therefore, that in selecting the individual to be subpoenaed there must exist some reason to believe that that individual possesses information relevant to the grand jury's investigation. At issue in this case is whether the individual's mere political views and associations alone form a constitutionally permissible basis for the issuance of a subpoena, particularly where the witness asserts that First Amendments rights will be harmed by compliance.

Political beliefs and lawful political associations are protected by the First Amendment and these protections extend to grand jury proceedings. Branzburg v. Hayes, 408 U.S. 665 (1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). In the instant case, the witness asserts that she was targeted for a grand jury subpoena for no other reason than that she is a Puerto Rican and a member of a political organization which espouses independence for Puerto Rico. The District Court, for purposes of reaching its decision, accepted this allegation as true.

The issue presented is a narrow one. We are not dealing here with an attempt to limit the scope of the subject matter of a grand jury investigation -- its right to look broadly into the actual or possible commission of crimes. The question, rather, is whether, pursuant to its investigation, the grand jury may subject anyone and everyone to compulsory process without any factual basis beyond the witness' political views or associations. If, for example, a grand jury were investigating an explosion at Democratic Party headquarters in New York where a note was found saying, "As a good Republican, I take responsibility for this explosion", could the grand jury subpoena any and every Republican Party member in New York solely on the basis of their membership, without any factual reason to believe that they possessed information about the crime? We argue that basing a subpoena on an individual's political views or associations is not sufficient to justify the damage resulting from the collision with the First Amendment.

In finding that the needs of the grand jury outweighed the witness' asserted First Amendment claims, the Court in Branzburg, supra at 701, stressed the evidentiary link between the subject investigation and the information possessed by the witness:

> " . . . it is quite apparent . . . that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others - because it was likely that they could supply

information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment." (emphasis added)

In Branzburg, it was not a question of whether the witnesses possessed relevant information, but whether the right they asserted to withhold information which they did possess outweighed the grand jury's right to obtain it. Allowing political associations and ideas to be the sole basis for subpoena would be tantamount to granting to the grand jury the same right to use a dragnet that the Supreme Court condemned in United States v. Davis, 394 U.S.721 (1969).

The courts have traditionall, exercised where First Amendment rights are concerned extreme caution by way of creating safeguards against unwarranted governmental intrusion into constitutionally protected territory. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963), Dombrowski v. Pfister, 380 U.S. 479 (1965), Carroll v. President and Commissioners of Princess Anne County, et al., 393 U.S. 175 (1968). The witness urges that the government can be required, without any undue disruption of the grand jury process, to come forward with an evidentiary showing that the witness has relevant testimony to offer. This showin would only be required where a witness has asserted a non-frivolous First Amendment Ground.

The court in Gibson was presented with a situation that is analogous to that presented here. The Florida

Legislative Investigation Committee was engaged in investigating "subversiye" or Communist activities in the State. Pursuant to this investigation, the Committee subpoenaed members of the N.A.A.C.P. of Miami. The Court quashed the subpoenas because of the failure to show any "meaningful relationship" between the N.A.A.C.P. and the Communist Party, and held that an evidentiary showing was necessary "before proceeding in such a manner as will substantially intrude upon or severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." Id at 547.

The specific harm to the future exercise of Ms. Torres' First Amendment rights is treated in part B, infra. The fact is that where such harm has been shown, the courts have created far more stringent safeguards than is suggested here. For example, in Dombrowski, supra, a pending state prosecution, presumably based on lawful evidence, was halted and in Carroll the Supreme Court condemned an ex parte order restrainign a political rally because, though certain ex parte orderes might be permissible, they are not where First Amendment freedoms are at issue. A grand jury subpoena is likewise ex parte.

No harm, and great good, can be done by directly requiring an evidentiary showing that a witness is likely to possess information relevant to the lawful investigation of a grand jury. If the government can make such a showing, then the witness' First Amendment claim may be overcome by Branzburg and the subpoena sustained. If no evidentiary

demonstration can be made, then the grand jury investigation is not harmed by quashing the subpoena for the simple reason that the expectation that the grand jury would hear relevant testimony was not based on fact; therefore, the grand jury has lost only the right to ask questions of a witness unlikely to possess the answers -- in other words, to "go fishing" in First Amendment waters.

The expectations of the grand jury in the instant case are based only on political associations and, hence, the District Court erred in failing to find just cause for the witness to refuse to answer.

B. The Mere Compliance With a Subpoena May Irreparably Harm First Amendment Rights.

It has become axiomatic that the most legitimate and unquestioned powers of government, created to facilitate its proper functions, may be misused to accomplish vain and repressive ends. The most recent history of our nation is replete with examples. It is precisely because it is the legitimate power of the government that is most often used to accomplish an illegitimate purpose that the Court must independently look beyond the facially legitimate activities into the political context in which they are used.

In additon to the infiltration-surveillance-disruption campaigns such as COINTELPRO aimed at polticially liberal and radical organizations, the government has employed the ordinarily

lawful grand jury process against its perceived adversaries to devastating effect. See Fine, Federal Grand Jury Investigation of Political Dissidents, 7 Harvard Civil Rights - Civil Liberties Law Review, 432 (1972)[1] and 8 Moore, Federal Practice, 6.02(1)(b).

A singular aspect of these grand jury investigations which posed and continues to pose a severe threat to the free exercise of political expression and association is, ironically, one which purports to protect the witness: grand jury secrecy. Though neither time nor space permits us to chronicle here the extent to which liberal and radical groups and individuals have been victimized by the endless government attempts to sow the seeds of internal discord and mistrust, suffice it to say that those seeds have borne fruit. Specifically, it has become impossible for principled political activists to go into the grand jury, isolated from the presence and scrutiny of their associates, under the intense pressure of a prosecutor and the pain of contempt, and give secret testimony about whatever may be of interest to a prying inquisitor. To do so would inevitably subject them to loss of the trust and confidence of their political associates.

In his dissent in In re Groban, 352 U.S. 330, 352 (1957), Justice Black explained why unrestricted secret interrogation is

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[1]The years 1970 to 1972 saw a " . . . dramatic escalation in use of federal grand juries to investigate the activities of political dissidents. Largely engineered and coordinated by the Justice Department's Internal Security Division, these investigations have spanned ten cities, involved no fewer than thirteen separate inquests, and subpoenaed over two hundred persons." Id. at 432.

intolerable:

> "Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival."

The grand jury has been and remains no less subject to "arbitrary misuse of official power" than any other institution of government, and the courts, therefore, must fashion safeguards.

One of the most reliable signals of arbitrary misuse is the absence of "any showing of a meaningful relationship" between the subpoenee and the subject matter of an investigation. Gibson v. Florida Legislative Investigation Committee, supra. at 898. If there is no basis, other than general political convictions, to believe an individual possesses information relevant to a lawful investigation, what purpose is then served by subpoenaing her other than to chill the exercise of First Amendment Rights? Certainly, no legitimate, much less compelling, state interest is served, nor any lawful right of the grand jury vindicated, by allowing citizens to be arbitrarily subjected to compulsory process without any basis for believing that they have relevant testimony to offer.

It must be emphasized, at this point, that the witness has never claimed that the investigation of bombings is not a proper subject matter for grand jury consideration. What she does suggest is that this investigation has a dual purpose, a hidden agenda, and that is to harrass and intimidate those who

lawfully espouse the cause of Puerto Rican independence by subpoening them to testify about bombings that occured allegedly in the name of Puerto Rican independence, thereby implying that they have knowledge of these bombings. The First Amendment does not allow the grand jury what, in effect, would be the broadest conceivable power to subpoena anyone and everyone who has ever espoused the cause of Puerto Rican independence. The Supreme Court condemned this type of broad and sweeping grant of power in Shelton v. Tucker, 364 U.S. 479, 488 (1960):

> "In a series of decisions this Court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

The legitimate and substantial purpose of investigating crime can be achieved and the need to effectively grant such sweeping, "dragnet" power avoided, by simply requiring that where witnesses claim that testifying would work severe and irreparable harm upon the free exercise of thier rights to political expression and association, the government make some factual showing of a meaningful relationship between the witness and the subject under investigation.

Because the District Court did not require such a showing and because, on the record, no such showing can be made, the contempt adjudication should be vacated and the witness excused.

## POINT II

THE DISTRICT COURT ERRED IN TREATING THE APPLICATION FOR IMMUNITY PURSUANT TO 18 U.S.C. SECTION 6002-3 AS AN EX PARTE PROCEEDING.

In finding no just cause for the witness' refusal to testify, Judge Brieant appears to set a new policy for the Southern District:

> "(T)he presentation of an immunity order to the Part I Judge of this Court did not and does not require a full adversarial hearing or any hearing and such an order may properly be signed ex parte without notice to (the witness) or her attorney." (Tr. 5/13/76, p.21)

It is submitted that in the light of law, reason and experience, the practice to be followed in this Circuit should be exactly the opposite of the ruling below.

The language of 18 U.S.C. Section 6002-3 is equivocal at best in determining whether the immunity application is to be treated as ex parte or on notice. The reference in Section 6003 that the immunity order shall issue "upon the request of the United States Attorney" merely states the person empowered to initiate the proceedings.

Once proceedings are begun, however, the procedure for carrying them through is found in the Federal Rules of Civil Procedure.[1] Rule 6(d) provides that:

> "A written motion, other than one which may be held ex parte, and notice of the hearing thereof shall be served not later than five days before

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[1]The analogous rule found in Federal Rules of Criminal Procedure 45(d) contains identical language.

> the time specified for the hearing, unless a different period is fixed by these rules or by order of the court."

The implication is that because the statute is silent, the motion for immunity is not to be regarded as ex parte.

Basic jurisprudential principles of due process also indicate that unless a specific designation is made, a party to be affected by an action of any court ought to be afforded notice and an opportunity to be heard. See In re Grand Jury Investigation (Frank), 317 F.Supp. 792 (E.D. Pa. 1970). And where a fundamental constitutional right is involved, due process requires proceeding on notice. Carroll v. President and Commissioners of Princess Ann County, supra.

This Court's ruling in U.S. v. Handler, 476 F.2d 709 (2d Cir. 1973) and In re Kilgo, 484 F.2d 1215 (4th Cir. 1973) which were relied upon by the District Court, do not express an opposing viewpoint. In these cases, the witnesses claimed that the denial of counsel at the immunity proceeding was reversible error. Both courts rejected the argument finding no deprivation of a constitutional right. However, underlying the distinction there drawn between an immunity proceeding and a contempt proceeding, is the stark reality of incarceration following a contempt adjudication, for which notice, opportunity to be heard and counsel are required. At the immunity stage, at least notice and a chance for the witness to be heard must be required. Se In re Veriker, 446 F.2d 244 (2d Cir. 1971).

U.S. v. Leyva, 513 F.2d 774 (5th Cir. 1975) is directly on point but proceeds from the opposite inference necessitated by the silence of the immunity statute; that because it does not explicitly say that a witness is entitled to notice, no notice is required. That court is apparently of the view that because the district court's function is "largely ministerial", there is no discretion in the judge to deny the application. Id. at 776.

The legislative history cited by the Kilgo court consists of the House Report which reflects the view that the district court's task is indeed largely ministerial. H. R. Report 91-1549, 2 U.S. Code Congressional and Administrative News 4007 at 4018 (1970). However, at House of Representative hearings in 1969 on the Federal Immunity of Witnesses Act, later enacted in almost identical form as 18 U.S.C. Section 6002, et. seq., Professor Robert G. Dixon, Jr., a consultant to the National Commission on Reform of Federal Criminal Laws which had originally drafted the bill, testified:

> "(T)his is not an anti-court bill. The courts came into the matter only in 1954 as a procedural element and have operated since only in ministerial fashion and only under a few statutes. We continue that (in the use immunity bill). None of this precludes a jurisdictional check (to safeguard the witness) against the agency exceeding its jurisiction, or even behond that a court check to see if there is an over-reaching in the process of immunizing somebody just as a matter of due process." Hearings on H. R. 11157 and H. R. 12041 before Subcommittee No. 3 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., ser. 14 at 69 (1969) (emphasis added).

Finally, the procedure under one of the repealed predecessors of the current use immunity statute, 18 U.S.C. Section 3486 (Immunity Act of 1954), is remarkably similar to that found in 18 U.S.C. Section 6003: the immunity order "shall" be issued upon application of the United States Attorney. Under this statute, the Court in In re Bart, 304 F.2d 631, 637 (D.C. Cir. 1962) found that the witness was entitled to notice and the opportunity to be heard prior to being compelled to testify.

There are sound reasons why the proceeding should not be conducted ex parte. Compliance with the specific requirements of the immunity statute must be demonstrated. Constitutional questions and jurisdictional questions can be raised and various protections for the witness can be worked out. In the instant case, although counsel for Ms. Torres was heard "as a matter of courtesy", significant questions were raised:

(a) The broad scope of the prospective immunity order. See In re Kinoy, 326 F.Supp. 407 (S.D.N.Y. 1970).

(b) The desireability of having the government certify existing evidence (if any) against the witness. See Goldberg v. U.S., 472 F.2d 513 (2d Cir., 1973).

(c) The desireability of having the government disclose to the witness any prior testimony taken under oath or prior written or recorded statements about which the witness will be questioned. Compare U.S. v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) where the Assistant U.S. Attorney advised the witness

that his "activities had been under surveillance for a considerable period of time." See U.S. v. Mandujano, U.S. (No. 75-754, May 19, 1976).

(d) The desireability of determining whether electronic surveillance exists which will form the basis for the expected questioning.

(e) Whether the immunity sought is, in fact, coextensive with the Fifth Amendment. See Point III, infra.

The cases which have dealt with claims of lack of notice (or counsel) in immunity proceedings all raise the question of what prejudice accrued to the witness by the failure to proceed as requested. See, e.g. U.S. v. Handler, supra, at 714, fn.6.

To the witness, the prejudice is clear: the only way to otherwise raise questions of a defective immunity proceeding is by risking a contempt adjudication. This means a hearing, with the expense of counsel, and the time spent in preparing and conducting the hearing. The witness must face a trial, civil in nature, with all of the uncertainties and intense pressures of a criminal proceeding.

In addition, practices which ought to be engaged in for fairness to the witness or convenience to the Court and which may not rise to the level of "just cause" to refuse to testify, must be dealt with at the only time available if they are to be dealt with at all.

In a proceeding where fundamental constitutional rights are to be supplanted, the witness should be at a minimum entitled

to notice and the chance to be heard, however summarily. In the exercise of its supervisory power, this Court should firmly establish that ex parte immunity applications are not to be accepted.

## POINT III

THE IMMUNITY CONFERRED IS NOT CO-EXTENSIVE WITH THE FIFTH AMENDMENT FOR IT MAY NOT PROTECT THE WITNESS FROM USE BY THE COMMONWEALTH OF PUERTO RICO.

In refusing to answer, the witness asserts as "just cause" that she cannot be adequately assured that her testimony or its fruits will not be used against her in a prosecution brought by local authorities under the penal statutes of Puerto Rico.

In Kastigar v. U.S., 406 U.S. 441 (1972), the Supreme Court upheld the constitutionality of the "use" immunity conferred by 18 U.S.C. Section 6002-6003. In so doing, the Court reaffirmed the rule first solidified in Murphy v. Waterfront Commission, 378 U.S. 52 (1964) that the immunity required by the Fifth Amendment protects a state-immunized witness from federal use of her testimony and a federally-immunized witness from the use of her testimony in a state prosecution. Kastigar v. U.S., at 455 et seq.

The legal process underlying the rule is the application of the Fourteenth Amendment to the states, binding their proceedings by the self-incrimination protections of the Fifth Amendment. Murphy v. Waterfront Commission, supra; Malloy v. Hogan, 378 U.S. 1 (1964).

The witness in the instant case finds herself in the midst of an investigation pursued by at least three jurisdictions: the federal government, the State of New York and the Commonwealth of Puerto Rico. Under Murphy she is assured that the State of

New York cannot use her testimony in any way. But there is no such case regarding the applicability of the Fourteenth Amendment to Puerto Rico -- no case holding that that sovereign is bound by the immunity conferred by the federal government. Indeed, the opinion in Murphy, 378 U.S. at 79 speaks not only of the consitutional rule, but the need to "accomodate the interests of the state and Federal Government in investigating and prosecuting crime . . . . "

It is submitted that Puerto Rico may have interests completely inconsistent with the federal government and that because Murphy relies in part on the nature of the relationship between the federal government and the states, an examination of differences with respect to Puerto Rico is appropriate.

Unlike states of the union, whose political relationship to the federal government has not been seriously at issue since the Civil War, the question of the "status" of Puerto Rico has been at issue for Puerto Ricans since Puerto Rico was ceded to the United States as a prize of war by Spain in 1898. The interest of the federal government and the interests of the states of the union, when dealing with the question of whether or not to prosecute, can be said to coincide.

The Court may assume that in certain instances, such as the control of narcotics, the interests of Puerto Rico and the United States may be exactly the same. But, while the issue of independence of Puerto Rico is of little or no concern to

the United States Government[1] every four years the question of the status of the island is put before the Puerto Rican electorate at the general elections. At least one party representing each of the three possible political alternatives available to Puerto Rico have participated in almost all of the elections since the beginning of the century. In 1976, one pro-commonwealth (Popular Democratic Party - "P.P.D."), one pro-statehood (New Progressive Party - "P.N.P.") and two pro-independence parties (Puerto Rican Independence Party - "P.I.P.") and Puerto Rican Socialist Party - "P.S.P.") will participate in the general elections, each with their preferred political status as the cornerstone of their respective programs.[2]

Accordingly, the government of the Commonwealth of Puerto Rico, when deliberating on whether or not to prosecute a 'political crime" allegedly committed by an "independentista", takes into account factors not even remotely considered by the federal government, where the alleged act could be a violation of both Commonwealth and Federal Statutes. Some of the considerations might be the decision on whether to prosecute, and for what, and to what degree of severity.

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[1] In 1952, when reporting to the United Nations on the new Constitution of the Commonwealth of Puerto Rico, the United States Ambassador said that Puerto Rico could get independence just by asking for it.

[2] Bolling v. Sharpe, 347 U.S. 497 (1954), cited by the District Court, is distinguished completely on this ground, for the District of Columbia has never been (and has never expressed a desire to be) independent of the United States.

In the instant case where the crimes under investigation appear to have political motives, the interest of the Commonwealth in independently deciding how to deal with the witness is great. The parallel interests of the immunizing and non-immunizing sovereigns which are assumed in Murphy are not the same on the question of independence for Puerto Rico.

As to the application of the Federal Constitution to Puerto Rico:[3]

> "That the question . . . is an open one, seventy years after the Treaty of Paris, and seventeen years after the establishment of Commonwealth, reflects the inconclusiveness and uncertainty which characterize the constitutional status of Puerto Rico . . . the Supreme Court of the United States has thus far demonstrated its institutional expertiese in avoiding a clear cut answer to the question of how much of the Federal Constitution is applicable to Puerto Rico. Helfeld, How much of the Federal Constitution is Likely to be Held applicable to the Commonwealth of Puerto Rico? 39 Rev.Jur. UPR, 169, 170 (1970).

The two most recent Supreme Court rulings concerning United States-Puerto Rican comity are of little help. In Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970), it is held that a Puerto Rican statute is not a "state statute" within 28 U.S.C. 1254(2), which permits appeals from judgments of federal Courts of Appeals holding state statutes unconstitutional. In

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[3]Prior to Commonwealth status, Puerto Rico was treated as an "unincorporated" territory. DeLima v. Bidwell, 182 U.S. 1 (1901); Fourteen Diamond Rings v. U.S., 183 U.S. 176 (1901), Balzac v. Porto Rico, 258 U.S. 298 (1922), Downes v. Bidwell, 182 U.S. 244 (1901). While "due process" as found in the Fifth and Fourteenth Amendments may apply to unincorporated territories (e.g. Balzac v. Porto Rico, supra) there has never been a majority opinion of the Supreme Court specifically defining what the essentials of due process are. Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955); see also, Coadert, The Evolution of the Doctrine of Territorial Incorporation, 26 Columbia Law Review 823 (1926).

Calero Toledo v. Pearson Yacht Leasing Co., 414 U.S. 816 it is held that enactments of the Commonwealth of Puerto Rico can be treated as "State statute(s)" for purposes of the Three-Judge Court Act, 28 U.S.C. 2283. Thus, there appear to be two different interpretations and conclusions regarding Puerto Rico within the same federal statutory scheme.

In being forced to relinquish her constitutional right to remain silent, the witness should not be forced to rely on the good faith of the U. S. government in complying with Rule 6(e) secrecy. In re Cardassi, 351 F.Supp. 1080, 1082 (D. Conn. 1972). The close cooperation between parallel investigatory agencies in New York and Puerto Rico heightens the possibility of access to whatever testimony or information may be provided by the witness.

The immunity conferred, therefore, is not co-extensive with the Fifth Amendment and the witness has just cause to remain silent.

## POINT IV

THE DISTRICT COURT ERRED IN FAILING TO FIND AN ABUSE OF THE GRAND JURY SUBPOENA AS AN ADJUNCT OF AN FBI INVESTIGATION INTO THE LOCATION OF FUGITIVES OR THE GATHERING OF POLITICAL INTELLIGENCE.

When Ms. Torres was initially subpoenaed on January 8, 1976, it was acknowledged that her testimony was then sought in order to aid the FBI in locating three men who were fugitives. The belated effort by the Assistant U.S. Attorney to amend the subpoena and scope by claiming that the grand jury was seeking information regarding the harboring of fugitives presented a factual question which should have been resolved at a hearing. While the submission of an ex parte in camera affidavit resolved the question to the satisfaction of Judge Motley, the witness urged at the contempt proceeding that the true purpose of her subpoena remained that of assisting the FBI in locating fugitives and gathering political intelligence.

Judge Brieant ruled: "And although the whereabouts of fugitives may be a first concern of the Federal Bureau of Investigation, it is also a concern of the grand jury." (Tr. 5/13/76, p. 20). The District Court did not rule at all with respect to the witness' claim that the grand jury is being improperly used to aid the FBI in intelligence gathering. The claim that the subpoena of Ms. Torres is part of a broad FBI search for her friends and associates and an effort to build a picture of the nature and structure of the Puerto Rican independence movement was accepted by the District Court and, found, in effect, legally insufficient.

There is no question that grand juries have broad powers of inquiry. See, e.g. Branzburg v. Hayes, 408 U.S. 665, 688 (1972); U.S. v. Calendra, 414 U.S. 338, 340-341 (1974); Blair v. U.S., 250 U.S. 273 (1918).[1] It is equally clear that the power is not unlimited. Kastigar v. U.S., 406 U.S. 441, 444 (1972), Branzburg v. Hayes, supra at 688, U.S. v. Dionisio, 410 U.S. 1 (1973). It is subject to constitutional, statutory and common law rights of the witnesses and parties to the proceedings. See, e.g. cases set out in In re Schofield, 486 F.2d 85, 91 (3rd Cir. 1973).

As important as these rights of a witness are, a more fundamental limitation is imposed upon the power to compel testimony by the very nature of the grand jury itself. In the constitutional allocation of judicial, executive and legislative powers, the grand jury is a judicial body and it can perform only judicial and not executive functions. Cf. Luther v. Borden, 7 How. 1, 12 L.Ed. 581 (1839). As Judge Weinfeld has stated:

> "The Federal Grand Jury is an appendage of the court, within whose jurisdiction it sits. As such its jurisdiction is co-extensive with the court's and cannot exceed it . . . When the instant Grand Jury undertook to trench upon matters

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[1] The continued vitality of Blair, relied upon by the District Court for the proposition that it was not entitled to set any limits at all to the grand jury's conduct, is open to question. See Howat v. Kansas, 258 U.S. 181 (1922) and In re Grand Jury Proceedings, Harrisburg, Pa., 450 F.2d 199 (3rd Cir. 1971) to the effect that Blair stands only for the proposition that a witness may not challenge the constitutionality of the statute which is the subject of the grand jury's inquiry. See also 7 Harvard Civil Rights - Civil Liberties Law Review, supra at 460-465.

> clearly within the purview of executive . . . authority, it exceeded its authority." Application of United Electrical Radio & Machine Workers, 111 F.Supp. 858, 864, 865 (S.D.N.Y. 1953). See also U.S. v. Smyth, 104 F.Supp. 283, 291 (N.D. Cal. 1952).

Accordingly, the subpoena power of a grand jury is restricted to use for a valid judicial purpose.[2]

The apprehension of fugitives is a function assigned exclusively to the Executive branch. See, e.g., Rules 4(c) and 9(c) of the Federal Rules of Criminal Procedure and 18 U.S.C. Section 3052. That branch may not, therefore, properly employ the process of the judicial branch to apprehend fugitives, as it seeks to do here. Such would be an abuse of the historic function of the grand jury and a violation of the doctrine of separation of powers. In re Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975).

Likewise, the gathering of intelligence is a function primarily of the executive branch although it may be supplemented by the legislative branch conducting hearings on proposed remedial legislation. The grand jury, as a function of the judicial branch is primarily concerned with the uncovering of criminal conduct, the identification of the criminal, and the public accusation which follows. General intelligence information which may or may not be connected with specific individuals or events, does not relate to criminal conduct. As broad as the

[2]What the Supreme Court has said in respect to the legislative power of investigation is properly analogous here: "(T)he power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose." Quinn v. U.S., 349 U.S. 155, 161 (1955)(emphasis added); Watkins v. U.S., 354 U.S. 178, 187 (1957).

powers of the investigatory grand jury may be, they must nonetheless bear on an investigation of criminal conduct in a particular case. Kastigar v. U.S., supra, Branzburg v. Hayes, supra, U.S. v. Dionisio, supra.

In considering this question, the argument made here is grounded in the fact that in fulfilling its function of apprehending fugitives, gathering intelligence and other responsibilities, the FBI does not itself have subpoena power. "Apparently Congress has never even attempted to vest FBI agents with . . . private inquisitorial powers." U.S. V. Minker, 350 U.S. 179, 191 (1956) (Justice Black, concurring). See also U.S. v. O'Connor, 118 F.2d 248, 250 (D.Mass. 1953):

> "So far as this Court knows Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases."

The denial by Congress to the FBI of compulsory process reflects an aversion to executive inquisitorial power which may not be circumvented by permitting the FBI to adopt the subpoena power of the grand jury to its own use in performing the executive functions of apprehending fugitives and gathering intelligence. And this Court, in the exericse of its undoubted supervisory power over grand juries in this Circuit, has the duty to prevent such abuse.

> "The grand jury contrary to what seems to be the prevailing general belief is an integral part of the judicial arm of the government and is not a mere tool of the prosecutor. The United States

> Attorney, the Federal Bureau of Investigation and other branches of the Department of Justice are integral parts of the executive branch of the government. The grand jury, being part and parcel of the judicial branch of government, is subject to a supervisory power in the courts, aimed at preventing abuses of its process or authority." In re Grand Jury Subpoena to Central States, 225 F.Supp. 923, 925 (N.D. Ill. 1964).

In Durbin v. U.S., 221 F.2d 520 (D.C.Cir. 1954), a U.S. Attorney compelled the appearance of a witness through issuance of a grand jury subpoena and then he and FBI agents questioned the witness (in his office), as part of their own investigation. A unanimous Court of Appeals condemned this tactic.

> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people . . . do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's Office.
>
> "It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition." 221 F.2d at 522.

Durbin, together with the other authorities discussed above, is ample authority to declare invalid the subpoena issued here. The sole distinction between Durbin and the instant case is that the U.S. Attorney and the FBI questioned the witness in one room in the federal courthouse (the U.S. Attorney's office) as opposed to another (the grand jury room). This is a differentiation without legal significance. In each case, the executive branch of government sought improperly to use the subpoena power of the judicial branch to perform a

responsibility committed solely to the executive branch.[3]

Finally, it should be noted that the witness claims that the issuance of the subpoena to her came as the direct result of her refusal to speak with the FBI agents and was the follow-through on a threat delivered to her by the agents that unless she talked with them, she would be subpoenaed. Based upon the record below, a conscious and deliberate policy of the FBI exists which, in effect, unlawfully shifts the decision for the issuance of a subpoena away from the grand jury and to the law enforcement agency. This increasingly common practice of coercing citizens to speak to FBI agents by the threat of a grand jury subpoena has been documented[4] and has occurred throughout the FBI's investigation of the Puerto Rican independence movement.[5] The FBI should not be allowed to to do indirectly what it may not do directly -- the grand jury "should not be allowed to become an arm of the FBI". In re Stolar, supra at 523.

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[3]Compare In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971) holding that a grand jury subpoena may not be used as a subterfuge to compel disclosures which may not be compelled by administrative (I.R.S.) process.

[4]See Donner and Cerruti, "The Grand Jury Network", The Nation, January 2, 1972, Cowan, "The New Grand Jury", The New York Times Magazine, March 12, 1973; and 7 Harvard Civil Rights - Civil Liberties Law Review, 432, supra.

[5]Affidavit of Stolar, 5/5/76, Affidavit of Torres, 2/3/76.

## POINT V

THE DISTRICT COURT ERRED IN ACCEPTING THE GOVERNMENT'S DENIAL OF ELECTRONIC SURVEILLANCE WITH RESPECT TO THE WITNESS.

It is well settled that upon a claim that a grand jury witness has been the subject of electronic surveillance, the government must affirm or deny whether such surveillance has taken place. Gelbard v. U.S., 488 U.S. 41 (1972). Section 3504(a)(1) of Title 18, United States Code is triggered by the mere assertion that unlawful wiretapping has been used against a party.

In a timely fashion, the witness claimed that she was the subject of or otherwise affected by electronic surveillance concerning the grand jury proceedings here in questions. After reluctantly hearing argument on the motion from Appellant's counsel (Tr. 4/21/76, 9-16), the District Court directed "that a search be conducted with respect to the United States Attorney in this district, and any particular specified FBI agent who authored anything that Mr. Nesland has in his possession." (Tr. 4/21/76, p. 15).

The government replied by affidavit submitted approximately one hour after Judge Brieant's order, averring that Assistant U.S. Attorney Nesland had conferred with three of his superiors in the Southern District and with the FBI agent in charge of the bombings investigation, and that none of these people had "any knowledge" or "were aware" of any electronic surveillance with respect to Ms. Torres.

By a second affidavit, submitted with the motion for contempt and executed six days after the first, FBI Agent Ronald W. Betkiewicz claimed to have received a negative response from FBI headquarters in Washington, D.C., and the field offices in Puerto Rico and New York regarding the presence of the witness' name on an "index" maintained by the FBI.

In finding no just cause to refuse to testify, the District Court held that the above responses satisfied the requirement of 18 U.S.C. 3504.

A. The Government's Denial Was Inadequate Because It Failed To Search For Surveillance Conducted By Government Agencies Other Than The FBI And By Private Persons.

In denying the witness' request for search and disclosure of electronic surveillance conducted by government agencies other than the FBI, the District Court defined the test as requiring disclosure of surveillance which might have been used in formulating the questions that were proferred to the witness (Tr. 5/13/76, p. 32). However, when applying this test, the Court ruled that:

> "(I)f any such surveillance were being conducted, and there is no reason now to believe that there has been, and if this surveillance were unknown to the Federal prosecutors it could not influence her rights in her appearance before this federal grand jury. (Tr. 5/13/76, pp. 34-35).

The true nature of the situation is quite the opposite: the broad nature of the questioning directed to the witness called into question every agency that has funnelled information to the

U. S. Attorney's office or to the FBI in connection with the FALN bombings investigation. The record shows that besides the FBI at least six other governmental agencies are involved: the New York City and New York State Police Departments, the Police Department and the Special Investigations Division of the Department of Justice of the Commonwealth of Puerto Rico, the Bureau of Alcohol, Tobacco and Firearms (see Tr. 5/13/76, p. 7) and the Central Intelligence Agency.[2]

It is, of course, of no moment that the U.S. Attorney responsible for formulating the questions asked of a witness may have no personal knowledge of electronic surveillance or taint. The rule does not merely prohibit the government from knowingly using these sources but from using them at all. Elkins v. U. S., 364 U.S. 206 (1960). The U. S. Attorney necessarily must use investigative reports prepared by other agencies which in this case include State, Commonwealth and local jurisdictions and "private" persons who may provide law enforcement officers with information without informing them that such information is the product of an illegal tap or bug.[3]

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[2]It is likely that additional agencies were involved in this inquiry, since the subject was bombing incidents including one at the famous Fraunces Tavern. Among these might be the United States Secret Service, the Department of Defense, the Customs Service, the Internal Revenue Service, the Postal Service and the Treasury Department.

[3]See Lugo affidavit, 5/5/76. In addition, a bail bondsman is listed as having provided information to the FBI in the Criminal Complaint against Todd-Pagan, Exhibit D, Motion to Quash.

See, e.g. U. S. v. Brown, 317 F.Supp. 531 (E.D. La. 1970). The denial was, on the record, inadequate and the District Court erred in not requiring a further search.

### B. The Limited Search Of The FBI "Index" Leaves Wide Open The Possibility That Electronic Surveillance Took Place.

In Exhibit "A" in support of her motion for search and disclsoure of electronic surveillance, the witness listed, for purposes of the search, telephone numbers and addresses of premises where she had an interest. The District Court ruled that she had no "interest" in any of these places[4] including the offices of the newspaper "Claridad" where she works.

The relevant precedents compel a contrary conclusion. A grand jury witness has standing to object to any surveillance occurring on her premises whether or not she was present, Alderman v. U.S., 394 U.S. 165 (1969), or of any other premises to which she has access and of which she makes use. U.S. v. Miguel, 340 F.2d 812 (2nd Cir. 1965), cert. den. 382 U.S. 859 (1965). A person has standing if she uses an office, U.S. v. Harris, 388 F.2d 373 (7th Cir. 1967), a part of one, U.S. v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), or uses some other commercial premise, ever if she does not rent it and it is used primarily by others. Foster v. U.S., 281 F.2d 310 (8th Cir. 1967).

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[4] Although the District Court in its May 13th ruling did not address the question of standing, it specifically "adher(red) to the rulings made previously on April 21st and May 6th." (Tr. 5/13/76, p. 14). Accordingly, for purposes of this appeal, we will assume that the District Court ruled that appellant had no standing to object to electronic surveillance of any of the listed premsies.

Ms. Torres works at both the political offices of the Puerto Rican Socialist Party and at its newspaper "Claridad". The newspaper relies upon her for its publication and she is entrusted with a key to the premises. She uses the telephones in both offices, and used them to discuss legal and political questions with friends, comrades and attorneys in connection with this proceeding. (See affidavit of Torres, 4/21/76). These premsies are constitutionally protected areas at which she had a right to be free of unlawful governmental intrusion and an expectation of privacy. Baker v. U.S., 401 F.2d 958, 984 (D.C. Cir. 1968).

Furthermore, the District Court relied on FBI Special Agent Betkiewicz' affidavit in which he made reference to an alleged FBI indexing system. The inadequacy and inefficiency of those indices was specially noted by Exhibit C to the affidavits in opposition to the contempt motion, an affidavit of William J. Bender attesting to the inadequacy of the "index" revealed at a post-trial "taint" hearing and by Exhibit D, a New York Times newspaper article of June 6, 1975 headlined FBI TAPS DATA MAY CONTAIN GAPS.

Experience has demonstrated the particular need for going beyond those indices in the electronic surveillance area. See O'Brien v. U.S., 386 U.S. 345 (1967) and Black v. U.S., 385 U.S. 26 (1966), where surveillance was first disclosed at the Supreme Court level. In U.S. v. Schipani, 289 F.Supp. 43

(E.D.N.Y. 1968), after conviction and after the Supreme Court had denied certiorari, the United States Attorney filed a supplemental memorandum with the Supreme Court suggesting that the Court vacate the judgment and admitting that there had been undisclosed wiretaps of the defendant due to the method employed by the FBI of recording and reporting electronic surveillance.

In U.S. v. Smilow, 472 F.2d 1193, 1195 (2d Cir. 1973), this Court noted:

> "In view of the history of this case, we cannot forbear expressing our regret that those representing the Government in court were unable, until such a late date, to discover the true state of affairs with regard to official wiretapping of Smilow's telephone conversations."

The disclosures generated as the result of the Watergate investigation and the recently issued reports of the Senate Select Committee on Intelligence, compel the conclusion, no matter how reluctantly, that the FBI and other governmental agencies are less than candid with the public and the courts. Any benefit of the doubt that once may have accrued to the government in this area has been effectively removed. The District Court erroneously accepted the affidavits offered by the government.

### C. The Affidavits Denying Electronic Surveillance Are Inadequate As To Form.

As previously noted, the electronic surveillance denial consisted of two affidavits. Mr. Nesland's is conclusory

and relies solely on hearsay. By its use of such language as "to my knowledge", "they have no knowledge", and "he is not aware", it purports to deny surveillance. Agent Betkiewicz' also relies on hearsay and does not specify names, addresses or positions of the persons involved, nor the nature of his request or the response, except that Ms. Torres was unlisted. In accepting them, Judge Brieant relied on Grusse v. United States, 515 F.2d 157 (2nd Cir., 1975); In re Buscaglia, 518 F.2d 77 (2nd Cir., 1975); Toscanino v. United States, 500 F. 2d 267 (2nd Cir., 1974); and, U.S. v. Van Orsdell, 521 F2d 1323 (2nd Cir., 1975).

In Grusse, District Court Judge Newman and this Circuit both accepted an affidavit which was characterized in Judge Lumbard's opinion as "probably insufficient under the standards we set down in United States v. Toscanino". Id. at 159. The inquiry here should not be so narrow and limited as to automatically transplant the result to this case. It is submitted that the FALN investigation is significantly braoder than the one in Grusse. Here witnesses from Puerto Rico, New York, Connecticut and Florida have been subpoenaed to appear. Undoubtedly the FALN investigation includes the coordinated efforts of various law enforcement and other governmental agencies.

We note too that after this Circuit's decision in Grusse (and after the witnesses served approximately one month

in jail), the term of the grand jury expired. The witnesses were resubpoenaed and again raised the question of electronic surveillance. This time Judge Newman entered an order directing the government to conduct a much broader search and to make a specific response.[5]

In re Buscaglia, supra, is also not dispositive. There the original response to the allegations of unlawful surveillance "was a denial by affidavit that appellant's residential telephones had been tapped." The prosecutor subsequently stated "there is no and there have been no wiretaps." Another affidavit was also submitted stating that "no wiretaps, electronic recording or transmitting devices of any kind were used or attempted during the aforesaid investigation." Id. at 79.

The Court's attention is directed to the absence of any conclusory or ambiguous language in the Buscaglia denials: no heresay, nor the "to my knowledge", or "he is not aware" averments which are made in the instant proceeding.

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[5] In re Marie T. Turgeon, Ellen Grusse, Diana Perkins, U.S. District Court, District of Connecticut, Civil No. N-75-122, N-75-123. By order dated May 20, 1975, Judge Jon O. Newman ordered the FBI to search "indices or other appropriate files of the National Office of the FBI and of those local offices of the FBI exercising investigating jurisdiction over areas that include premises listed" herein (the list includes 29 individuals and 39 premises scattered through 14 cities, 6 states and the District of Dolumbia). He further ordered that the response should include affidavits from "responsible officials of the FBI who are in a position to know, indicating whether the results of any electronic surveillance of such persons or premises by national, state or local law enforcement agencies have been included in the files of the FBI."

In Buscaglia, an affidavit from the special attorney employed by the Department of Justice was submitted swearing:

> " . . . that he personally prepared the questions which were asked of each appellant-witness before the grand jury and that these questions were prepared exclusively from reports derived from first-hand observations of an FBI undercover agent and an FBI informant. He further swears that to the best of his knowledge and belief no such question was formulated from information which was directly or indirectly derived from the use of electronic surveillance. (Emphasis Added). Id.

Mr. Nesland's affidavit claims that:

> " . . . the six questions propounded to Miss Torres in the Grand Jury were formulated solely by me. As appears obvious on the face of each question, they refer to public facts. No part of the information utilized by me in formulating those questions for Miss Torres was derived from materials which reflect or even suggest any form of electronic surveillance involving Miss Torres."

The Buscaglia affidavit states that the questions were prepared exclusively from reports derived from first-hand observations of an FBI undercover agent and an FBI informant. Mr. Nesland's affidavit lacks such specificity and leaves open the possibility that the Torres investigation is based, in some part, on information or leads furnished by other agencies about whose sources and activities he may not know.

U.S. v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974) also fails to support the District Court's decision:

> " . . . The district court was obligated to direct the prosecutor to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked and extending the denial not only to conversations

> of Toscanino but also to conversations of anyone else occurring on premises owned, leased or licensed by Toscanino. (Emphasis Added.)

Absent here is the requirement that the government extend its denial to conversations of the witness and of anyone else which occurred on premises owned, leased or licensed by her. The search accepted by the District Court was limited to the Torres' name. If the requirement of Toscanino that the denial must include a listing of which agencies have been checked is to have any meaning, the denial must include those agencies involved in the investigation.[6]

The fourth case cited by the District Court, U.S. v. Van Orsdell, supra, in fact supports the witness' position. From Van Orsdell, at 1325:

> "The original affidavits submitted by the FBI stated, among other things, that 'no one identifiable as John Calvin Van Orsdell, born August 23, 1933, was the subject of a direct electronic surveillance by the Federal Bureau of Investi[illegible]ion. . . .
>
> " . . . (A) further affidavit was submitted which stated in part:
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> > 'It was not my intention to equivocate in any manner whatsoever through the use of the word 'direct' in paragraph two of my original affidavit dated October 11, 1974.

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[6]Here, as in In re Quinn, 525 F.2d 222, 225 (1st Cir. 1975):

> "(T)he investigation involved activities with international overtones which could reasonably have engaged the attention of (other) agencies . . . and such other agencies might to some degree have fueled the present inquiry."

Required of the government is "an explicit assurance indicating that all agencies providing information relevant to the inquiry were canvassed."

> 'I previously made a careful and diligent search of appropriate records of the Federal Bureau of Investigation determined that no one identifiable as John Calvin Van Orsdell or any one by his known aliases, including Crayola, was every monitored by any electronic device of the Federal Bureau of Investigation.'"

This court's attention is again directed to the absence of any conclusory or ambiguous language -- no hearsay, nor the "to my knowledge" and "he is not aware" averments which plague the instant proceeding.

The District Court treated this point as "differences concerning wordings which might enhance the representations made to appearance without in any way improving their substa ce." (Tr. 5/13/76, p. 34).

We disagree. The purpose of an affidavit is to place a burden on the affiant to tell the truth and place him or her in a position to be prosecuted for perjury if the affidavit is false. U.S. v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973). The language used by the government in this case exposes no one to anything should it later be revealed that electronic surveillance has been conducted (and hidden) by someone other than Mr. Nesland himself. The distinction is ıot one of appearance -- it is one of vital substance.

## POINT VI

### THE DISTRICT COURT ERRED IN FAILING TO REQUIRE DISCLOSURE OF ELECTRONIC SURVEILLANCE OF THE WITNESS' ATTORNEYS

In support of allegations that counsel had been unlawfully surveilled, the witness offered her own affidavit that she suspects that the telephones she uses are subject to electronic surveillance and that she uses these telephones to consult, on matters related to this case, with friends, comrades and her attorneys.

The affidavits of Martin R. Stolar and Jose Antonio Lugo, counsel for the witness since January 12, 1976, were also sumbitted and were specific enought to warrant a search. U.S. v. Alter, 482 F.2d 1016 (9th Cir. 1973). They related specific incidents which led counsel to believe that they had been subjected to electronic surveillance. They specified named and telephone numbers of the persons with whom they or their associates were communicating at the time the surveillance took palce, as well as dates both of the incidents and the period when they were representing the witness. Furthermore, since some of the conversations referred to were between co-counsel for the witness, or between counsel and other people associated with the legal representation of the witness, they made a strong connection between the alleged wiretaps and the instant grand jury proceeding.

The District Court, in not requiring a search failed to take any of this into consideration:

> "If Miss Torres were a participant in any conversation, including conversations with her attorneys, that should have been revealed in the FBI indices. In declining to direct that this search be made at this time, I state for the record that all of the witness' rights with regard to privileged communications with her attorneys are in no way prejudiced or diminished by the ruling I am making here." (Tr. 5/13/76, p. 35).

The Court appears to say that a violation of the Sixth Amendment right to counsel only occurs when conversations between the witness and her attorneys are illegally overheard.

Nothing could be further away from the reality of the situation. Overhearings of an attorney may be more detrimental to the rights of a witness than overhearings of the witness herself. The attorney is often required to talk about legal strategies and confidential facts with third persons and the overhearing of a legal strategy may well be a destruction of the adversary process. See U.S. v. Hoffa, 387 U.S. 231 (1967).

Not surprisingly, electronic surveillance of counsel has met with the strongest condemnation. In Coplon v. U.S., 191 F.2d 749 (D.C.Cir. 1951), cert. den. 342 U.S. 926 (1952), the court held that a reversal of a conviction would be mandated if such allegations were true. The Supreme Court hailed this case as "rightly decided" in Hoffa v. U.S., 385 U.S. 293, 307 (1966).

In Beverly v. U.S., 468 F.2d 732 (5th Cir. 1972), the Court was confronted with a situation very similar to the case at bar. The government had denied surveillance of the conversations of the appellants, but the denial failed to cover

the telephone number where their counsel had been staying. The Court held that:

> "This leaves open and undenied the suggestion that there were overhearings of conversations between counsel for the Appellant and their clients or with third parties as to matters confidential between attorney and client." Id. at 750. (Emphasis Added.)

A similar result was reached in U.S. v. Seale, 461 F.2d 345 (7th Cir. 1972), where the Court held that the Sixth Amendment may be violated where neither participant to the overheard conversation is the attorney or the client, where the conversation relates to the councils of the defense.

U.S. v. Alter, supra at 1026, established a five-pronged test for determining whether disclosure of electronic or other surveillance of counsel for grand jury witnesses was warranted. The test has been adopted by most circuits in the nation*, and at least one panel of the Second Circuit has cited it with approval. In re Buscaglia, 418 F.2d 77, 78 (2nd Cir. 1975).

This Court should formally adopt the Alter test in the instant proceeding, and since the facts alleged in Lurieda M. Torres', Martin R. Stolar's and Jose Antonio Lugo's affidavits meet the standard enunciated in Alter, the order of the District Court holding the witness in contempt should be reversed.

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*See: In re Lochiatto, 497 F.2d 803 (1st Cir. 1974); U.S. v. McCord, 509 F.2d 334 (D.C. Cir. 1974); U.S. v. See, 505 F.2d 845 (9th Cir. 1974); U.S. v. Boe, 491 F.2d 970 (8th Cir. 1974); and In re Vigil, 524 F.2d 209 (10th Cir. 1975).

## CONCLUSION

Almost seventy years ago, speaking of the inquisitorial power of the grand jury, the Supreme Court said:

> "Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them." Hale v. Henkel, 201 U.S. 43, 65 (1906). (emphasis added).

The issues raised in this case flow not from the unsupported assertions of a litigious witness, but from the executive's perceived need for inquisitorial power, denied to it directly, but increasingly available through domination and misuse of the grand jury. As the FALN investigation proceeds along the political lines which have heretofore been established, the claims of other non-collaborating witnesses may be expected to reach this Court. Counsel urge that the government's cry of "terrorism" not be accepted as a sufficient basis to suspend the law and the Constitution.

The order of contempt should be vacated and the witness excused from the suopoena.

Respectfully submitted,

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Attorneys for LUREIDA M. TORRES

Counsel wish to acknowledge Veronika Kraft, Helene Pimsler and Richard J. Wagner.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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In Re

Grand Jury Subpoena of

LUREIDA TORRES,

A witness before the Grand Jury.

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STIPULATION SETTLING RECORD ON APPEAL

It is hereby stipulated and agreed that the following shall constitute the record on appeal for the instant cause:

| | Document | Filed By | Date Filed |
|---|---|---|---|
| 1. | Order to Show Cause to Quash Subpoenas | Witness | February 4, 1976 |
| 2. | Affidavit in Opposition to Motion to Quash | U.S.A. | February 4, 1976 |
| 3. | Transcript of Proceedings (2/9/76) (Motion to Quash) | Stenographer | February 11, 1976 |
| 4. | Transcript of Proceedings (3/3/76) (Motion to Quash) | Stenographer | March 5, 1976 |
| 5. | Application for Immunity Order and Order | U.S.A. | April 21, 1976 |
| 6. | Transcript of Proceedings (4/21/76)(Immunity) | Stenographer | April 23, 1976 |
| 7. | Motion for Disclosure of Electronic Surveillance and Affidavits | Witness | April 21, 1976 |
| 8. | Affidavit of Nesland (Electronic Surveillance) | U.S.A. | April 21, 1976 |

| | Document | Filed By | Date Filed |
|---|---|---|---|
| 9. | Motion for Contempt, Affidavits and Exhibits | U.S.A. | April 26, 1976 |
| 10. | Affidavits and Exhibits in Opposition to Motion for Contempt | Witness | May 6, 1976 |
| 11. | Affidavits of Siegel and Wunsch in Opposition to Motion for Contempt | Witness | May 17, 1976 |
| 12. | Transcript of Proceedings (5/6/76)(Contempt) | Stenographer | May 9, 1976 |
| 13. | Transcript of Proceedings (5/13/76)(Contempt - Includes Findings and Conclusions of Court) | Stenographer | May 17, 1976 |
| 14. | Motion to Instruct Grand Jury | Witness | May 13, 1976 |

Dated: New York, New York
May 24, 1976

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your order of confinement until you have had a chance to have the matter reviewed by The Court of Appeals, unless the stay is vacated by that Court which, of course it has the power to do on motion.

Now, I am prepared at this time to deliver my decision on the various claims which have been asserted, and what follows here will constitute my findings of fact and conclusions of law.

MR. STOLAR: Judge Brieant.

THE COURT: Yes? Could you wait until I have finished, then raise anything you wish? Because I have a number of matters I want to touch on. You may find that some of your enquiries have been satisfied. So why don't you just wait until I finish?

MR. STOLAR: I will, Judge. I was going to say I think we are entitled to a hearing before you render findings --

THE COURT: You had a hearing.

MR. STOLAR: (Continuing) -- at which witnesses can be called and sworn.

THE COURT: No, you sit down. I am stating my findings and conclusions. I have given you a hearing, a full hearing. I have the transcripts before me and I am relying on them and I am making my findings and con-

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clusions, and if there is anything unclear about them you can raise it with me when I finish. I will hear you.

Now, I want to state first that I am adhering to the rulings made previously which appear in the transcripts of the proceedings on April 21st and May 6th, and to the extent I don't repeat anything in those rulings at this time they are deemed to be included by reference in these findings and conclusions. And I find that no just cause has been shown for the witness' failure to answer the first five of the six questions propounded by the Assistant United States Attorney before the grand jury. I will come to the matter of the sixth question in a moment.

As a ground for just cause the witnes contends that the questions asked violate her right to freedom of association secured by the first amendment and in this regard I will follow the analysis of this problem suggested by the Ninth Circuit decision in Bursey against The United States, 466, Fed. 2nd, 1059. In balancing the rights of a grand jury witness under the first amendment against the lawful requirements of our system of criminal justice and the needs of the grand jury in discharging its duty, there are three significant require-

ments, and I regard them to be as follows:

First: The subject matter of the investigation must be immediate, substantial and superior in public importance to the witness' interests. In this regard I find that the subject matter of this grand jury's investigation is precisely of this nature. The investigation of this series of bombings which has resulted in four deaths, a path of mayhem and destruction in this city, is certainly immediate and substantial. And the rights of society are such that the witness' constitutional rights must be balanced by and subordinated to the needs of this investigation into these bombings.

What I regard to be the second requirement under the Bursey decision is that there be a substantial connection between the information sought by the grand jury and the overriding Governmental interest in the subject matter of the investigation.

And, as to the first five questions propounded in the grand jury by the Assistant United States Attorney I find that there is a substantial connection. Indeed, the first five questions go to the very heart of the Government's interests. These questions ask the witness to identify any persons known to her who

were involved in the commission of a series of felonies in this District which The Court can only characterise as crimes of random violence designed to threaten the city with a reign of terror.

The third requirement of the Bursey decision is that the means of obtaining the necessary information be no more drastic than necessary to serve the Government interest asserted. And, again, I find that the first five questions satisfy this question. The questions are designed to obtain information immediately related to the felonies under investigation.

The questions are no broader than the need of the investigation and they do not impinge upon the witness' reights of association any more than has been demonstrated to be necessary.

Now, so far I have focused only on the first five questions propounded to this witness before the grand jury. The sixth question poses special difficulties.

The Bursey case requires that in this sensitive area the investigation must proceed step by step, and a proper foundation for questions and the need for these questions must be laid. And at this point in the grand jury proceedings it cannot be said that such a foundation has been laid.

The sixth question requires the witness to identify persons who are members of the FALN, the so-called armed forces of the Puerto Rican National Liberation the Group that it is alleged has publicly claimed responsibility for the bombings which were under investigation,and it may well be true that if this witness were to respond fully and truthfully to the five previous questions there would be no need for any answer to this sixth question.

The first five questions deal directly with the commission of criminal acts, but mere membership in the FALN, even if its members, some of them, might have been participants in the bombings, is not a crime in itself. And when a witness is asked to identify who the members are of an organization to which he or she may or may not belong, that question impinges directly, and perhaps in this case, needlessly on the witness' first amendment rights.

Presumably nobody could know a membership list under the circumstances without either being a member or being associated with members. And on numerous occasions The Court has protected against Government enquiry against members of organizations. The cases are well known, NAACP against Alabama, 357 U. S. 449, Gibson against The Florida

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Legislative Investigation Committee, 372 U. S. 539, a contrary case in The District of Columbia Cicruit on The National Right to Work Foundation, but I don't rely on that.

I am prepared to find and do find that The Government has not at this time laid a proper foundation for the broad enquiry which is found in the sixth question. The Gove. nment has not demonstrated the necessary connection between the information which that question would elicit and The Government's interest in investigating these felonies committed in this District.

In so holding I do not mean to imply that the question could not properly be asked if The Government in its investigation could demonstrate the necessary foundation.

I therefore find that at this time on the present record that the witness had just cause for not answering the sixth question. I believe I made my position clear in that aspect of the matter at the time of our prior meeting. But, in any event, this constitutes my findings with respect thereto.

Now, the witness has contended that there is just cause for her refusal to answer because the process of the grand jury is being abused to pursue investigations

which she contends are beyond the province of this grand jury, and specifically that counsel for the witness has argued that the grand jury is be ng used as an adjunct of the FBI and that the subpoena power of the grand jury is being misused in an effort to apprehend fugitives, a function properly belonging to the FBI, and so it is claimed, not to the grand jury.

I find no merit whatsoever to this contention. The Assistant United States Attorney has stated in the presence of the foreman of the grand jury who agreed with his representations that the grand jury is presently investigating these bombing incidents for violations of Title 18 United States Code, Sections 371, 1842 (a) 3, 842 (j), 844 (d), (e), (f), (g) and (i), and Section 1071 and 1361.

However, merely stating that it is believed that certain Federal Statuates were violated does not limit the scope of the permissable investigation by the grand jury. As Chief Judge Kaufman stated in the case of United States against Mancuso, 485 Fed. 2nd, 275 at page 281, in footnote 17, it bears quotation, "The issues before a grand jury, however, are not pre-determined. Its function is to investigate possible crimes against the sovereign so that it can make a judgment whether a trial

on specific charges is necessary. The scope of the legitimage enquiry is, therefore, broad and materiality of testimony may more readily appear than in a proceeding whose dimensions are established at the outset." That is the end of the quotation, and of course by the latter reference the context of his opinion would seem to suggest a trial pursuant to a written indictment.

Now, I find it would not be ultra vires for a grand jury to be concerned with the activities of persons who travel in interstate of foreign commerce to avoid prosecution because that is made a crime under Section 1073 of Title 18. And although the whereabouts of fugitives may be a first concern of The Federal Bureau of Investigation, it is also a concern of the grand jury.

Finally on this poing I want to note that a court is not entitled to set limits to the investigation that a grand jury may conduct. That is the authority of Blair against United States, 250 U. S. Page 273 at page 282.

Now, the witness' next contention is that there is just cause for her refusal to answer the questions because the immunity order granted pursuant to Title 18 United States Code, Sections 6002 and 3 was defective.

First the witnes claims that the order should

not have been granted ex parte. The order was presented to me by the Assistant United States Attorney on April 21st, 1976. At that time it happened that both the witness and her counsel were present when the order was presented to me in chambers and signed. And counsel for the witness was heard simply as a matter of courtesy.

Also The Court ruled at that time, and I adhere to the ruling, that the presentation of an immunity order to the Part I Judge of this Court did not and does not require a full adversarial hearing or any hearing, and such an order may properly be signed ex parte without notice to Miss Torres or her attorney. And I rely on the case of United States against Leyva, 513 Fed. 2nd, 774, a recent Fifth Circuit case which is closest to the fact issue raised, the legal issue raised by these facts. I believe the Second Circuit would follow this authority in view of the decision in the Handler case, United States against Handler, 476 F. 2nd, 709, where an adjudication of civil contempt was affirmed and the Court held that the absence of counsel at the hearing at which the immunity order was granted did not deprive the witness of any constitutional right. You might also look at In re Kilgo, 484 F. 2nd 1215 at page 1221, that is a Fourth Circuit

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case.

Now, as I understand it, Miss Torres' contention with regard to the immunity order is that the immunity order itself should have limited, or should have set forth a listing of the subject matter of questions to be covered by the order. I find no legal basis for doing that here. I have previously stated that the investigatory powers of our grand jury are extremely broad and these powers are not to be interfered with or abridged by this Court.

I find no prejudice to the witness' right in not so limiting the order. The immunity conferred by Section 6002 and the order issued under it would have immunized her from the use of her testimony in a prosecution for any federal crime concerning which she had given a responsive answer or any statement.

I will come later to the issue of whether it applies to possible criminal responsibility in the Commonwatlth of Puerto Rico.

Now, another contention made by the witness was that the immunity order should have been conditioned upon the court directing The Government to seal and certify whatever evidence it has in its possession prior to the testimony in the grand jury concerning any crimes which

may have been committed by the witness, Miss Torres, and the purpose of this request is to insure that in any subsequent prosecution of the witness The Government will not be able to make use of testimony that she is compelled to give under this grant of immunity.

Now, there is no question that this procedure might prove to be the prudent course of action not only for the protection of the witness, but for The Government as well, but although this procedure is to be commended and regarded favourably it is not required.

I refer you to the case of Kastigar against The United States, 406 U. S. 441, which upheld the constitutionality of Section 6002, and that case holds, in effect, that the burden would be on the Government not limited to a negation of taint, but rather a duty to prove that any evidence it proposes to use is derived from a legitimate sourse wholly independant of the compelled testimony.

Thereafter, in Goldberg against The United States, 472 F. Second 513, decided in this Circuit, The Court of Appeals affirmed an adjudication of civil contempt, although the witness contended that adequate safeguards were not employed to insure that no use would be made of his testimony, and the Court stated, and I will

quote from that opinion, "If Goldberg now answers the questions and the Government should seek to pursue him further, its burden of showing that it is not using the compelled testimony, or any information directly or indirectly derived from such testimony or other information, in any respect will be substantial, as we warned the Assistant United States Attorney at argument. But, that question is not now before us, and may never be."

That is the end of the quotation.

Now, as in the Goldberg case the issue of some future prosecution of Miss Torres is not now before this Court, and it may never be. The witness' rights are secure in that The Government will bear a substantial burden in future prosecution of Miss Torres of demonstrating that its evidence was not derived from the testimony obtained under this immunity order.

Now, the witness also contends that it is just cause for refusal to answer because she hasn't been supplied with any prior statements she may have made. And the witness correctly acknowledges that under the grant of immunity she may still be prosecutred under Title 18 Section 1623 for knowingly making a false declaration before the grand jury. But the possibility of this prosecution does not entitle her to receive copies of any prior

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statements that she may have made, and I rely here on United States against Camporeale, 515 F. Second, 184, a Second Circuit case, which holds that the Assistant United States Attorney is under no obligation to warn a grand jury witness that the Government had surveillance photographs taken by the FBI which might tend to indicate that his testimony was false.

There is also a case in Florida entitled, In re Grand Jury Witness Subpoenas, 370 F. Supplement 1282 where the Court held that a grand jury witness was not entitled to a copy of his prior grand jury testimony merely because there was a possibility of Section 1623 prosecution if he knowingly made a false declaration on his second appearance before the grand jury. But, I find no just cause for refusal on this ground.

Another ground which was raised is that the witness had just cause for her refusal because the questions propounded by the Assistant United States Attorney before the grand jury were overbroad, complex and compound questions which would generally be regarded as bad as to form.

On April 21st I stated on the record that I believed the questions asked were complex, compound and might not be fully understood by the witness. And the record will

show that I instructed Miss Torres that if she didn't understand the questions asked by the Assistant United States Attorney she could properly ask that the questions be broken down in separate parts and simplified so they could be understood.

Of course, many times it is not in a witness' interest to insist on that because a garbled question invites a garbled answer. However, the record will show that at that time Miss Torres' counsel correctly and candidly acknowledged on the record that although the questions were complex and compound that was not the basis for her refusal to answer. And when Miss Torres re-appeared before the grand jury after receiving my instructions she did not request that the questions be simplified, although she had been instructed that she should indeed do that.

In a Ninth Circuit case, United States against Weinberg,, 439 Fed. Second, 743, the Court stated something which bears quotation: "None of the questions concerning which the court reporter gave testimony in the contempt proceedings are vague. Some of them were broad and compound. Had any appellant told the United States Attorney that he would try to answer such a question it it were simplified or propounded in parts, there would be

a basis for complaint. But the appellants made no such requests and uniformly indicated, in effect, that they would not answer the questions no matter how simple."

That is the end of the quotation from Weinberg. And I find that this contention has no merit, although I do instruct you, Miss Torres, and I might say when I finish stating my findings and conclusions, I will advise you about your rights with regard to this adjudication of civil contempt, but I do want you to understand that you will have the opportunity to appear before the grand jury again, and at that time, as I instructed you earlier, you have the right to ask that any question that you do not understand because it is too complex or compound be restated for you in a simple and understandable form. That is the privilege of every witness, and I have previously mentioned it to you. It must be complied with if you request it.

Now, it is also contended here that the witness was prejudiced by the Government's use of a sealed affidavit which apparently was relied upon by Judge Motley at the time in denying her motion to quash the subpoena. The witness claims that the use and acceptance of the sealed affidavit deprived her of the opportunity to contest in an adversary proceeding whatever fact allegations might

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have been made thereon.

I take the view that a motion to quash is merely ancillary to the grand jury proceedings, and unlike an adjudication of civil contempt, the denial of a motion to quash does not result in an appealable order. And that is quite clear. Look to United States against Ryan, 402 U. S., Page 530.

Furthermore, the motion to quash is likely to arise at a relatively early stage and at a time when it is of the utmost importance to protect the secrecy of the grand jury proceedings. I find no case which prohibits the use of a sealed affidavit by opposing the motion to quash a grand jury subpoena. The Dinsio case relied on, a Ninth Circuit case, arose on a motion pursuant to Rule 42 (b) of The Federal Rules of Criminal Procedure where they were seeking to hold the defendant in criminal contempt. That is an entirely different situation which is not involved here. That rule entitles the defendant to notice, an adversarial hearing and a trial by jury if a penalty in excess of $500 is sought, and that may not be in the section, but that is what the cases hold.

The Court takes the view that Title 18, Section 1826, which forms the basis of the proceedings here authorizes the Court to summarily order the confinement

of a recalcitrant grand jury witness, and I am relying in part on the matter entitled In re grand jury proceedings against Schofield, at 486 Fed. Second 85, a Third Circuit case, where there is a very good exposition of the importance of keeping grand jury deliberations secret.

In that case the Third Circuit refused to rule out the possibility that The Government may present its affidavit in camera even in a proceeding such as this to adjudicate a witness in civil contempt. A fortiore it would be proper in a proceeding to quash a grand jury subpoena.

And, finally, I will say as I said earlier, it is clear from Judge Motley's order denying the motion to quash that she was satisfied with the grounds set forth by The Government for proceeding by subpoena, and it was within her discretion in so ruling to take the sealed affidavit and consider it, and I will not, nor can I sit in review of the findings of a co-equal co-ordinate Judge of this District. And I cannot, nor would I attempt to second-guess her exercise of discretion in the aspect of the case which was before Judge Motley.

And in refusing to disturb her determination here and her valid exercise of discretion I am relying

on cases of which there are many in the District. The one that comes to mind is Kinoy against Mitchell, 331 Fed. Supplement 379, a recent Southern District case in which Judge Frankel had twice refused to quash a grand jury subpoena and at a later time Judge Tenney of this Court refused to hear the witness litigate the same issues again even though they were asserted before him in the context of a different claim.

Now, for the reasons stated I find that the use of the sealed affidavit in opposition to the motion to quash did not provide Miss Torres with just cause to refuse to answer the first five questions.

I will now come to the question of wiretaps. The witness has invoked her rights under Title 18 Section 2515 and the case of Gelbard against The United States, 408 U. S. 41, requesting The Government to affirm or deny the use of electronic, unlawful electronic surveillance as required by Section 3504 of Title 18.

Prior to her appearance before the grand jury on April 21st, I directed the Assistant United States Attorney to submit a suitable response to this request in accordance with that section and the cases in this Circuit, and Mr. Nesland filed his affidavit sworn to on April 21st which is before me, and in the limited

time available prior to Miss Torres' next scheduled appearance before the grand jury Mr. Nesland's affidavit shows that he conferred with The United States Attorney himself, the Chief Assistant, and the Chief of the Criminal Division of The United States Attorney's office for this District, and also with a Special Agent of the Federal Bureau of Investigation in charge of the criminal investigation of the terrorist bombings that are the subject of this grand jury investigation, and on the basis of all these discussions with these persons intimately involved with the ongoing investigation of these crimes, Mr. Nesland states under oath that he had been advised that none of these persons were aware of any electronic surveillance being conducted or ever having been conducted with respect to Miss Torres.

On April 21st I found that Mr. Nesland's affidavit adequately complied with my directive in the time permitted for him to conduct his search. Since that time he has requested a further check of the central files of the FBI in Washington, D. C., and a particular check of the FBI files in the field offices in Puerto Rico and in New York City to determine whether any electronic surveillance exists involving the witness. And Special Agent Betkiewicz who is assigned to that investigation

has sworn by affidavit.

As a result of this check the FBI files disclose that there has been no electronic surveillance of this witness. He attests to the fact that they maintain their files under the name of the person and not merely under a telephone number.

Now, before we get too far afield in this area of electronic surveillance it should be recalled that the purpose of this check of the FBI files was to enable the Government to respond adequately under Section 3504, and that it is relevant only because under the Gelbard decision the witness has just cause for refusing to answer questions before a grand jury if those questions were derived from unlawful electronic surveillance.

What is ultimately at issue here is whether the questions asked of Miss Torres before the grand jury have been derived from a tainted source, that is to say, that they are the product of unlawful electronic surveillance.

Now, Mr. Nesland has sworn in his affidavit of April 27th, 1976, at page five, that the six questions were formulated solely by him and that no part of the information utilized by him in formulating the questions was derived from materials which reflect or even suggest any form of electronic surveillance involving Miss Torres.

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Now, this is the true focus of our enquiry here, and that conclusion is supported by the Buscaglia case in this Circuit which relies upon the concurring opinion of Judge Lumbard in the Grusse case, both of which all of you are well familiar with.

Now, it is contended that the affidavits are inadequate as to form, but I believe that the affidavits submitted here constitute an adequate denial for purposes of Section 3504, and in so finding I am relying on the cases of Grusse and Buscaglia and Toscanino, and United States against Van Orsdel, 521 Fed. Second 1323.

I specifically find that the statement under oath by Mr. Nesland that the questions to be propounded to this witness are not derived from electronic surveillance is clear and unambiguous. That is really the central focus of our enquiry here.

I further find that he has conducted an adequate and sufficient enquiry to determine whether there exists any electronic surveillance information previously unknown to him. And I find that he and Special Agent Betkiewicz have stated the negative result of their enquiry in adequate form.

We all try within the limitations of language to lend certain clarity to our thoughts, and I believe the

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affidavits are sufficiently concrete, unambiguous.

I am reminded that Dean Michael Sovern of Columbia Law School in commenting publicly on possible unemployment in the legal profession stated that one of the remarkable characteristics of our adversarial legal system is that if there is an attorney on one side there must be an attorney on the other side, and in this regard I regularly make the observation that there is virtually nothing one lawyer cannot draft or state that another lawyer cannot read and emit a howl of rage about the claimed inadequacy of the wording.

I regard the argument made concerning the affdavits as differences concerning wording which might enhance the representations made as to appearance without in any way improving their substance. At this stage of these proceedings when Miss Torres is appearing before the grand jury only as an immunized witness I decline to direct the Government to conduct any further search for electronic surveillance with State, Commonwealth or local law enforcement agencies. By the Commonwealth I mean The Commonwealth of Puerto Rico.

If any such surveillance were being conducted, and there is no reason right now to believe that there has been, and if this surveillance were unknown to the

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Federal prosecutors it would not influence her rights in her appearance before this federal grand jury. And likewise, I am going to decline to direct the U. S. Attorney to conduct a search for any electronic surveillance of the witness' attorneys.

If Miss Torres were a participant in any conversation, including conversations with her attorneys, that should have been revealed in the FBI indices. In declining to direct that this search be made at this time, I state for the record that all of the witness' rights with regard to privileged communications with her attorneys are in no way prejudiced or diminished by the ruling I am making here. She is entitled to the protections accorded by cases such as the Rosner case in this Circuit, and Gartner, United States against Gartner, 518 Fed. Second 633, in the event that there should have been or may have been any breach of her attorney-client privileges, and if she should subsequently be prosecuted for any crimes.

I think I should observe that further enquiry into possible electronic surveillance in the face of the denials under oath by persons intimately familiar with the investigation and by the person who was framing the questions would be both unnecessary and undesireable.

I rely on the expression of opinion by The Supreme Court of The United States against Dionisio, 410 U. S. page 1, 17, and there The Supreme Court opinion says, and I quote, "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."

That is the end of the quotation. And that is what we are not going to have here is threshhold minitrials before the grand jury can do its work.

I believe that the hearings and showings made thus far have been necessary to assure the witness of her rights. I decline to protract these proceedings further by requiring a greater showing on the part of the Government. And the reasons for declining to do so are made all the more poignant in an investigation that involves terrorist bombings and murder.

Now, the contention which I said I would mention and I now will turn to is that there is just cause for the witness to refuse to answer because the Section 6002 immunity that she has been granted is not coextensive with her FifthAmendment privilege. The contention here made is that she has no assurance that this testimony would not

be used in a prosecution by The Commonwealth Government in Puerto Rico, and specifically the contention is that the Murphy case against The Waterfront Commission, 378 U. S. 52, which would grant the witness use immunity in any subsequent state prosecution under these circumstances, may not be recognized and applied by The Commonwealth Courts of Puerto Rico.

There are a few observations to be made in this regard. First, I believe that Rule 6(e) of The Federal Criminal Rules of procedure bars the disclosure of this grand jury testimony to Puerto Rican authorities. This of course doesn't preclude any independant investigation by the Commonwealth Government to the extent that Commonwealth law might have been violated by the witness.

I believe that the witness' legal position in this regard is without merit. The Toscanino case, Supreme Court cases cited therein instructs us that the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens. And if this testimony were to be used in Puerto Rico, which is not a foreign country, then this would involve The United States Attorney's Office in an abridgement of the witness' rights. And even if you read the Murphy case so narrowly as to not apply to The Commonwealth

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Government there is every reason to expect that the same result would obtain.

The witness is protected against self-incrimination by the Fifth Amendment. In another context, Bolling v. Sharpe, 347 U. S. 497 applied the Fifth Amendment to the District of Columbia where the Fourteenth Amendment did not apply because the District of Columbia is also not a state. So that I believe that the courts of Puerto Rico would be required to follow the principle of the Murphy case and the witness will be protected in Puerto Rico by The United States Constitution, as I previously noted.

Now, in addition in Puerto Rico the witness would be entitled to this protection together with the protection of Title 48 United States Code, Section 737, which provides in language practically identical to the Fifth Amendment that no person from Puerto Rico may be compelled in any criminal case to be a witness against himself. So that reading the statuate together with the constitutional protection discussed in Murphy and Toscanino I believe the use immunity would be available to Miss Torres in Commonwealth Courts.

Finally I might say there is no doubt that the due process clause of the Fifth Amendment applies in Puerto

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Rico, and Calero-Toledo against Pearson Yacht Leasing Company 416 U. S. 663 shows that. A fortiori, I think the same thing would apply to the balance of the Fifth Amendment privileges. Under the circumstances presented here, if this testimony were to be used by the Puerto Rican government for a prosecution of Miss Torres, it would amount to a denial of due process. I am relying on the Rochin case, 342 U. S. 165.

I would say further that if any conviction were to result from any such prosecution relief on these grounds would be available of the witness by writ of habeas corpus in The Federal Court.

Now, I have tried to cover the issues, some of which are numerous and extensive, as rapidly and as completely as possible. I recognize that the claims here affect sensitive issues and principles, and to insure further that the rights of this witness will be protected I am prepared to order on the request of her counsel that if she does appear and testify that she be provided with a transcribed copy of her testimony when the grand jury has completed its investigation or immediately for good cause shown.

This is a procedure which has been employed in Rhode Island and in California. The relevant cases appear

to be Minkoff, at 349 Fed. Sup. page 154, and Russo, 53 Federal Rules decisions, page 564.

Now, ordinarly it would be my practice to write a memorandum and order decision and I have attempted instead to dictate my findings into the record immediately from my rough notes because I have considered this application for an adjudication of civil contempt to be a matter of urgency.

The grand jury here is considering crimes of special concern to any organized society, and I will direct on the record, I will make an oral order pursuant to Title 28 Section 1826 that Miss Torres be adjudged in civil contempt and be confined as I previously stated for the duration of the life of the grand jury or until she purges herself from her contempt by answering the first five questions. And I have previously stated that I will stay the effect of that order to permit appellate review or to permit the Government to apply in The Court of Appeals to vacate the stay pending appellate review, whichever course counsel wish to take.

If it is necessary to have a separate formal paper, then I am going to direct the Assistant United States Attorney to prepare such an order, and I will sign it on his submission.